



# 1<sup>st</sup> Armored Division Legal Assistance Office



09-00

## LAST WILL AND TESTAMENT & LIVING WILLS

### LAST WILL AND TESTAMENT

A person who dies without a will is said to have died “intestate.” Each state has an intestacy law which controls how an intestate’s property is distributed. Most states’ laws distribute intestate property to the deceased’s next-of-kin in order of proximity (i.e. the deceased’s spouse would receive the property before the children, who take before the deceased’s parents, who take before the brothers and sisters, etc.). Intestacy laws vary somewhat from state to state. If you are unsure of how your state statute disposes of your property, or you want to be sure that your property goes to particular people, you should make a will.

A last will and testament is a legal document, effective upon death, which directs how one’s property will be distributed, and provides for the guardianship of one’s children. The person who makes the will is called a testator (male) or testatrix (female) and can designate an executor (personal representative) to manage his or her estate and distribute his or her property. The executor may be under court supervision and may have to post a bond to ensure the proper settlement of the estate when the will is admitted to probate. However, the testator can waive the bond requirement in the will. Wills do not expire on their own, so the will you make today will be legally valid even if you die 50 years from now.

A person who receives property under a will is called a “beneficiary.” All of one’s property may be left to one beneficiary, or divided among several people. However, some states’ laws do not allow the testator to disinherit, or leave nothing to his or her spouse or children.

Although most people should have a will, not everyone needs one. A single person with no children and few assets may not need or want a will. However, everyone with children would be wise to name a guardian in the will so a judge will not have to decide that issue upon the death of both parents (basically, a court will have to appoint a guardian so the parents should have a say in the matter). Also, a will is necessary any time you want to leave specific property to persons who are not close relatives. The costs of settling one’s estate may be far greater without a will because of additional court involvement. Making a will may thus be a good idea even if one owns little property. Whether you make a will is a personal decision that should be based on one’s individual needs. No one can be ordered or required to do so.

Not all of your property passes to your beneficiaries under your will. For example, SGLI and other life insurance benefits go to the person you designate on the insurance forms.

However, since your SGLI will probably be your biggest asset on death you should ensure that it goes to the people you wish to benefit (most people benefit the same persons as set out in their will). Make sure you go to local PAC or PSB to make the necessary changes. Also, real estate which you own as a “joint tenant” with another person does not pass under your will. When you die, your share of that property passes to the other living joint owners. These arrangements allow you to dispose of your property upon your death without the need for a will or court involvement since the property passes outside the probate estate.

Property left to a minor under a will is managed for the child’s benefit by the guardian or custodian in accordance with state law. Alternatively, you can create a trust in your will, naming a trustee to manage the property for your children. The property is then distributed to each child as he or she reaches the age of majority (usually 18 or 21), or any age you designate in the trust.

A will is effective until revoked or changed. You can revoke your will by destroying it or making a new one. You can also change your will by preparing a new one, or by amending the old will in a document called a “codicil.” It is better to make a new will because amending the old one may create inconsistencies. Never erase, write on, or make changes to your executed will as any unexplained marks may invalidate your will. If you wish to make a will you should see an attorney because wills have very specific technical requirements in their drafting and execution to be legal.

Review your will early and consider changing it upon new circumstances like marriages, divorces, births, deaths, and the acquisition or transfer of property. Your local legal assistance attorney can help with estate planning.

### LIVING WILLS

#### What is a living will?

A living will is a document which tells your doctor and family members about the types of life support you want withheld in case you are terminally ill and no longer able to communicate your wishes yourself. Each state regulates the use of living wills differently. Do not confuse a living will with a last will and testament. The living will has nothing to do with property distribution and is solely to entrust specific family members with medical decisions.

#### Do I need a living will?

Improved medical technology allows health care providers to prolong life as never before. However, in some cases prognosis for recovery may be hopeless and in many instances patients endure pain and suffering while the resources of surviving family members are depleted. As long as you are able to make and express decisions about your care, you can accept or refuse medical care, even when you are unconscious or too ill to communicate. Without a living will, your family and caregivers will have to make some very difficult decisions and they may not be able to agree. Also, without clear evidence of your wishes, loved ones may not be able to stop treatment even if they believe you would do so because some states require clear proof of the patient's intentions. A living will may therefore be of great benefit to your family and caregivers because it can spare them emotional anguish and conflict.

#### **How difficult is it to make a living will?**

Most states have specific formats which may be used. These formats begin with a general statement that you do not want to prolong the dying process with life-sustaining procedures that are not necessary for your comfort or to alleviate pain. You are then often allowed to add your desires concerning specific procedures such as hydration and nutrition (tube-feeding), cardiopulmonary resuscitation (CPR), artificial respiration, kidney dialysis, blood transfusions, antibiotics, etc. Most states also allow you to name a proxy to make the specific health care decisions. Your Legal Assistance Office can provide you with the state specific forms.

#### **When will the living will go into effect?**

Your living will becomes legally valid as soon as you sign it in front of the required witnesses. It will not be used, however, as long as you are able to make your own decisions about your medical care. In most states, before your living will can be acted on, two physicians must certify that you are unable to make medical decisions AND that you are in the medical condition specified in the state's "living will law" (such as "terminal illness" or "permanent unconsciousness").

#### **Which state's law applies to your living will?**

The laws of the state in which your civilian medical facility is located apply to your living will. Army medical treatment facilities do not follow any particular state law when determining whether or not to honor a living will. However, the Army recognizes the right to refuse medical treatment and will give considerable deference to your desires expressed in a living will for any state.

#### **What should I do with my living will?**

Make several certified copies of the original. Keep the original in a safe but easily accessible place. **DO NOT KEEP YOUR LIVING WILL IN A SAFE DEPOSIT BOX.** Tell others where you put the original, and write the location of the original on the copies. Discuss and give a copy of your living will to members of your family, your personal physician, and your proxy if you have chosen one. Your living will is no good if you are unconscious and nobody knows about your stated wishes in the document.

Whether you decide you want a living will or not is a personal decision - no one can force or order you to sign one if

you do not desire to do so. A living will is not part of the will that disposes of your property and it is not a document authorizing assisted suicide. The document is an expression of your desire not to receive extraordinary medical treatment if your medical condition appears hopeless. It is your decision to make one or not.

#### **How can I prepare a living will?**

Your local Legal Assistance Office can schedule an appointment for you with an Attorney who can help you prepare a living will.

If you have any questions regarding wills, trusts or estate planning, contact your local Legal Assistance Office.

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